

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERATT

MNILTAP2019/0001

BETWEEN:

ROYAL BANK OF CANADA

Appellant

and

DEMORNEA ARMSTRONG

Respondent

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal [Ag.]

Appearances:

Mr. Jean Kelsick for the Appellant

Mr. Karl Markham for the Respondent

2021: January 26;

2022: February 08.

Civil appeal — Labour dispute — Labour Tribunal — Sections 23 and 24 of the Labour Code — Jurisdiction — Whether the Tribunal was lawfully constituted in accordance with the applicable legislative provision at the hearing of the labour dispute

On 26th January 2021, this Court heard an appeal brought by Royal Bank of Canada (“the appellant”) challenging the decision of the Labour Tribunal (the “Tribunal”) dated 7th December 2018. By that decision the Tribunal granted an application brought by Demornea Armstrong (“the respondent”) for compensation relating to his claim of unfair dismissal against the appellant. Following the hearing of this appeal, on 29th July 2021 this Court, differently constituted, quashed two subsequent decisions of the Tribunal on the basis that the Tribunal had been improperly constituted prior to its adjudication on those matters. Notably, in June 2021 the Parliament of Montserrat passed the Labour Code (Amendment) Act 2021 amending certain provisions of the Labour Code 2012 which concern the appointment and constitution of the Tribunal. The lawful constitution of the Tribunal was not raised as an issue at the hearing of this appeal, however, in light of the two subsequent decisions of this Court on 29th July 2021, the Court directed counsel for both parties to file further written submissions on the preliminary issue of

whether the Tribunal was lawfully constituted in accordance with the applicable legislative provision at the hearing of the respondent's application on 10th May 2018.

Held: allowing the appeal, quashing the order of the Tribunal dated 7th December 2018, remitting the matter for hearing and determination before a properly constituted quorum of the Tribunal and making no order as to costs, that:

1. In accordance with the presumption against the retrospectivity of legislation, at the time of the hearing on 10th May 2018, the composition and ultimately the lawful constitution of the Tribunal was governed by section 24 of the **Labour Code** 2012 and not section 24 as effected under the **Labour Code (Amendment) Act** 2021. Therefore, the Tribunal would only have been considered lawfully constituted where it was composed of the Chief Magistrate as the Chairperson of the Tribunal, or another magistrate to whom he or she has delegated the function, and six appointed members, with three members representing the interests of employers and three members representing the interests of employees.

Section 24 of the **Labour Code**, Cap 15.03, Act No. 20 of 2012, Laws of Montserrat applied; **Gany Holdings (PTC) SA and another v Zorin Sachak Khan and others** [2020] ECSCJ No. 105 (delivered 30th March 2020) followed.

2. The Tribunal as constituted at the hearing on 10th May 2018 comprised of the Chief Magistrate as the Chairperson of the Tribunal and two Tribunal members. That quorum did not accord with the composition which was mandated under section 24 of the **Labour Code** 2012. Therefore, the Tribunal was not properly constituted during the hearing on 10th May 2018 and had no jurisdiction to adjudicate on the respondent's application before it. Accordingly, the decision of the Tribunal dated 7th December 2018 is void and of no effect.

JUDGMENT

- [1] **THOM JA:** This is an appeal by Royal Bank of Canada ("the appellant") challenging the decision of the Labour Tribunal (the "Tribunal") dated 7th December 2018. By this decision the Tribunal granted an application brought by Demornea Armstrong ("the respondent") on 22nd February 2018 for compensation relating to his claim of unfair dismissal against the appellant, and awarded him the sum of \$68,775.00.

Background

- [2] On 26th January 2021, this Court heard the appellant's appeal and reserved its decision. Following the hearing of this appeal, on 29th July 2021, this Court

quashed two subsequent decisions¹ of the Tribunal on the basis that the Tribunal had been improperly constituted prior to its adjudication on those matters. The consideration of the Tribunal's jurisdiction to determine labour disputes was not raised as an issue at the hearing of this appeal, however, in light of the aforementioned subsequent decisions of this Court on 29th July 2021, counsel for both parties were directed by correspondence from this Court dated 27th September 2021 to file further written submissions on the following questions:

- (i) What is the legislative provision which provides for the establishment and composition of the Tribunal?
- (ii) Whether the Tribunal which heard the matter was lawfully constituted in accordance with the legislative provision?

[3] In an unfortunate turn of events, shortly after directions were given to counsel for the parties to file further submissions, counsel for the respondent, Mr. Karl Markham, passed away. The correspondence of this Court dated 27th September 2021 was personally served on the respondent on 28th September 2021, however no further submissions were forthcoming from him. In the circumstances, further submissions on the aforementioned questions were only filed on behalf of the appellant.

Preliminary Issue

[4] The validity of the Tribunal's jurisdiction to adjudicate on the respondent's application which was before it is a threshold issue which must undoubtedly be resolved prior to embarking any determination of the appellant's substantive appeal. In the circumstances, the preliminary issue for this Court's consideration is whether the Tribunal was lawfully constituted in accordance with the applicable legislative provision at the hearing of the respondent's application on 10th May 2018 ("the Jurisdiction Issue").

¹ See *Keston Riley v Montserrat Port Authority* (MNILTAP2020/0001, delivered 29th July 2021, unreported) and *St. Augustine Primary School v Evelyn Gibson* (MNILTAP2019/0003, delivered 29th July 2021, unreported).

Submissions

- [5] Counsel for the appellant, Mr. Jean Kelsick submitted to this Court that the establishment and composition of the Tribunal are governed by section 24 of the **Labour Code**² (“the Code”). He argued that the Tribunal had not been lawfully constituted at the time of its decision dated 7th December 2018 in accordance with the Code. He submitted that section 24(1) of the Code mandates that the Tribunal is to comprise seven members, however, the Tribunal comprised only three members when it heard the respondent’s application for compensation, namely, the Chairman (the Chief Magistrate), a lay member representing the interests of employers and another lay member representing the interests of employees. On that basis, Mr. Kelsick asserted that the unfortunate effect of this is that every decision of the Tribunal since the enactment of the Code is voidable.
- [6] Mr. Kelsick also stated that section 23(2) of the Code contemplates the passage of rules of the Tribunal by the Governor acting on the advice of Cabinet. He submitted, however, that no such rules had been enacted thereunder. He asserted further that the power of the Tribunal to regulate its own procedures under section 23(3) of the Code did not empower it to decide that it could properly sit as a panel of three members.

Discussion

The Labour Tribunal - Historical Background

- [7] The Code was promulgated into law in 2012, adopting a modern scheme for the resolution of labour disputes. At the time of its passing the Code repealed several enactments including the earlier Employment Act 1979 which previously governed, among other things, the establishment and composition of the Tribunal. While it was in force, sections 37 and 38 of the Employment Act provided as follows:
- “37. (1) The Governor-in-Council after consultation with the chairman of the Judicial and Legal Services Commission shall appoint the Chairman of the Tribunal.
- ...
38. (1) The Governor-in-Council shall appoint six members of the Tribunal.

² Cap 15.03, Act No. 20 of 2012, Laws of Montserrat.

- (2) Three of the members shall represent the interests of employees and three the interests of employers.
(3) Notwithstanding subsections (1) and (2) of this section the Governor-in-Council shall have power to vary the number of members by Order but not the balance between employers' and employees' representation."

[8] Under the second schedule of the Employment Act 1979, which concerned the rules of the Tribunal, rule 6 provided:

"6. When hearing any application the Tribunal shall consist of the Chairman and two members chosen by the Chairman. One member shall be from the panel of members representing employers and the other from the panel of members representing employees."

[9] The aforementioned provisions make it clear that at the time when the Employment Act 1979 was in force the Governor-in-Council was mandated to appoint a Chairman and six members to the Tribunal split equally to represent the interests of employees and employers respectively. However, critically, section 38 gave the Governor-in-Council the power to vary the number of members on the Tribunal, given that the balance remained between representatives of the interests of employers and employees respectively among those members. Moreover, rule 6 of the second schedule of the Employment Act 1979 provided that at the hearing of any application, the Tribunal ought to consist of the Chairman and two members, each one chosen from the panel of members representing employers and the panel of members representing employees respectively.

[10] The use of a three member panel (the Chairman and two members) appears to have been the practice of the Tribunal under the scheme of the Employment Act 1979. However, as previously noted, the Employment Act 1979 was repealed when the Code was passed into law in 2012. It is therefore crucial to scrutinise whether provisions of similar effect to sections 37 and 38 and rule 6 of the Employment Act 1979 were reproduced in the Code.

The Labour Tribunal under the Code

[11] As I set out the relevant provisions of the Code, it is important to note at this juncture that the Code has undergone recent amendments which have impacted

the provisions that now govern the establishment and composition of the Tribunal. The most recent amendments to the Code were effected by the **Labour Code (Amendment) Act, 2021**³ (“the Amendment Act 2021”), which came into force on 30th June 2021. In circumstances where the hearing date of the respondent’s application before the Tribunal (being 10th May 2018), fell before the passing of the Amendment Act 2021, it is apposite that I set out the relevant provisions both as they were before and are now after the Amendment Act 2021 came into effect.

- [12] Under the Code, the provisions relevant to the constitution of the Tribunal are sections 23 and 24. I will first set out the relevant provisions as they read prior to the passing of the Amendment Act 2021. Sections 23 and 24 previously read:

“The Labour Tribunal

23. (1) There is established a Labour Tribunal to settle any dispute transmitted to it by the Labour Commissioner.
(2) The rules of the Tribunal shall be made by the Governor acting on the advice of Cabinet.
(3) Subject to subsection (2), the Tribunal shall regulate its own procedure.

Appointment of the Tribunal

24. (1) The Governor acting on the advice of Cabinet shall appoint 6 members to the Tribunal –
(a) 3 members representing the interests of employers;
and
(b) 3 members representing the interests of employees.
(2) The appointment shall be for such period as the Governor acting on the advice of Cabinet shall specify and each appointment shall be subject to renewal.
(3) The Chief Magistrate shall be the Chairperson of the Tribunal.
(4) Despite subsection (3), the Chief Magistrate may delegate the function of Chairperson, on a case by case basis, to another magistrate.”

- [13] The Amendment Act 2021 included amendments which affected both sections 23 and 24 of the Code. Section 23 has been substituted in full and now reads:

“23. The Labour Tribunal

- (1) There is established a Labour Tribunal to settle disputes transmitted to it by the Labour Commissioner.

³ Act No. 11 of 2021, Laws of Montserrat.

- (2) The rules of the Tribunal are set out in Schedule 3 and may be amended by Order by the Governor acting on the advice of Cabinet.
- (3) Subject to subsection (2), the Tribunal shall regulate its own proceedings.”

[14] Section 24 has only been amended to the extent that subsection (1A) has been inserted, which reads: ‘(1A) A person who has been convicted of an indictable offence is disqualified from being a member of the Labour Tribunal’.

[15] The newly added Schedule 3, as given effect by section 23(2) of the Code as amended, provides several rules governing the Tribunal. The rules thereunder relevant to the circumstances of this case are rules (5) and (6), which read:

- “(5) The Chairperson and –
 - (a) one member representing the interests of the employer; and
 - (b) one member representing the interests of the employeeconstitute a quorum at a hearing before the Tribunal.

(6) The Chairperson shall preside at all sittings of the Tribunal.”

Lawful Composition of the Labour Tribunal before and after the Amendment Act

[16] A review of the above provisions under the Code reveals that prior to the Amendment Act 2021 the Tribunal was mandated to consist of a Chairperson, who must be either the Chief Magistrate or another magistrate, to whom the Chief Magistrate has delegated the function of Chairperson, along with six appointed members split equally in representation of the interests of employees and employers respectively. Notably, prior to the Amendment Act 2021, section 23(2) provided for the rules of the Tribunal to be made by the Governor acting on the advice of Cabinet. However, there were no provisions in effect under the Code prior to the Amendment Act 2021 which established actual rules of the Tribunal. The result being that under the Code before the amendments, the composition and ultimately the lawful constitution of the Tribunal was fully governed by section 24 in absence of any complementary rules being made by the Governor under section 23(2). Therefore, under the Code prior to the Amendment Act 2021, the Tribunal would only be considered lawfully

constituted where it was composed of the Chief Magistrate as the Chairperson of the Tribunal, or another magistrate to whom he or she has delegated the function, and six appointed members, with three members representing the interests of employers and three members representing the interests of employees.

- [17] The Amendment Act 2021 has introduced amendments to the Code which have now changed the parameters of the lawful composition of the Tribunal. The relevant effect of the new amendments is that the Tribunal continues to be lawfully constituted where composed of the Chief Magistrate as the Chairperson of the Tribunal, or another magistrate to whom he or she has delegated the function, and six appointed members with three members representing the interests of employers and three members representing the interests of employees. However, section 23(2) now establishes Schedule 3 of the Code which delineates the rules of the Tribunal. Importantly, rule (5) provides for the Chairperson, one member representing the interests of the employer and one member representing the interests of the employee to constitute a quorum at a hearing before the Tribunal. Further, rule (6) mandates that the Chairperson shall preside at all sittings of the Tribunal. Therefore, presently, once the Chairperson, or his or her delegate is presiding at the sitting of the Tribunal, along with one member representing the interests of the employer and one member representing the interests of the employee, the quorum of the Tribunal is considered properly and lawfully constituted.

The Jurisdiction Issue

- [18] As a reminder, the hearing of the respondent's application before the Tribunal took place 10th May 2018, while the Tribunal's decision which is the subject of this appeal was dated 7th December 2018. Therefore, the order of the Tribunal was made before the passing of the Amendment Act 2021.
- [19] I find it convenient at this stage to briefly recall the rules of statutory interpretation in relation to the retrospective application of legislation. In **Gany**

Holdings (PTC) SA and another v Zorin Sachak Khan and others⁴ this Court recited the principles applicable to the retrospective application of legislation. Delivering the judgment on behalf of this Court, Michel JA stated at paragraph 31:

“At common law, there is a well-established presumption against the retrospective operation of legislation. The presumption is summarised by the authors of Maxwell on the Interpretation of Statutes, as follows:

‘it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.’

The overarching policy underpinning the presumption in this area was simply expressed by Lord Mustill in *L’Office Cherifien des Phosphates and Unitramp S.A v Yamashita-Shinnihon Steamship Co Ltd*, as ‘no more than simple fairness’. In more practical terms, Bennion on Statutory Interpretation states the policy on the presumption as follows:

‘[t]he essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow’s backward adjustment of it.’”

[20] I adopt the above principles as apt and apply them accordingly. In circumstances where no such construction of retrospectivity is made clear on the provisions of the Amendment Act 2021, it cannot be said to have been intended by Parliament to have retrospective effect. This means that the question of whether the Tribunal was lawfully constituted at the time of the hearing of the respondent’s application must be resolved with reference to the relevant provisions of the Code as they were prior to the Amendment Act 2021.

[21] At the hearing of the respondent’s application for compensation the Tribunal constituted of the Chief Magistrate as Chairperson of the Tribunal, and two Tribunal members. That quorum does not accord with the composition which was mandated under section 24 of the Code as it read prior to the Amendment Act 2021. In order for the Tribunal to have been considered lawfully constituted at the time of the hearing, the quorum would have needed to include, along with the Chairperson, six appointed members as characterised under section 24(1)(a) and (b) of the Code.

⁴ [2020] ECSCJ No. 105 (delivered 30th March 2020).

[22] For completeness, it is apt that I also address Mr. Kelsick's submission that the power of the Tribunal to regulate its own procedures under section 23(3) of the Code, as it pertained prior to the Amendment Act 2021, did not empower it to decide that it could properly sit as a panel of three members. I agree. It is noteworthy that under the scheme of the Employment Act 1979, section 38(3) provided that notwithstanding that the Governor-in-Council is mandated to appoint six members to the Tribunal under subsection (2), the Governor-in-Council had the power to vary the number of members by order but not the balance between employers' and employees' representation. That power to vary the number of members would have been exercised by the Governor-in-Council in a capacity separate and distinct from the Tribunal itself. No provision of similar effect to section 38(3) was re-enacted under the Code when it was passed in 2012. Instead, section 23(3) of the Code prior to the amendments, provided that subject to rules of the Tribunal made by the Governor under section 23(2), the Tribunal had the power to regulate its own procedure. It is pellucid that under the Code prior to the amendments it is the Tribunal and not the Governor that is empowered to regulate the Tribunal's procedure. Therefore, the requirements under section 24 of the Code for the formation of the Tribunal must have first been observed in order for regulation of procedure to be conducted by the Tribunal as it is contemplated under the Code. As a result, the Tribunal, being not properly constituted at the time of the hearing on 10th May 2018, would not have been empowered to regulate its own procedure and, therefore, was not empowered to vary the quorum to three members for the adjudication of labour disputes.

[23] The ineluctable conclusion, in my view, is that the Tribunal was not properly constituted during the hearing on 10th May 2018 and therefore it had no jurisdiction to adjudicate on the respondent's application before it. In light of this, the decision of the Tribunal dated 7th December 2018 is void and of no effect, having been made by a panel constituted without the requisite jurisdiction.

Conclusion

[24] Given the totality of all that I have foreshadowed, I would allow the appeal and quash the order of the Tribunal dated 7th December 2018 on the basis that the

Tribunal was not properly constituted in accordance with section 24 of the Code at the time when it made the order. I would also remit the matter before a properly constituted quorum of the Tribunal for the respondent's application dated 22nd February 2018 to be heard afresh. Furthermore, given the circumstances of the appeal's determination, I would make no order as to costs.

Order

[25] For the reasons stated, I would order that:

- (i) the appeal is allowed;
- (ii) the order of the Tribunal dated 7th December 2018 is quashed on the basis that the Tribunal was not properly constituted in accordance with section 24 of the Code when its order was made;
- (iii) the matter is accordingly remitted for hearing and determination before a properly constituted quorum of the Tribunal; and
- (iv) there shall be no order as to costs.

I concur
Louise Esther Blenman
Justice of Appeal

I concur
Margaret Price-Findlay
Justice of Appeal [Ag.]

By the Court

Chief Registrar